IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 588 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHUBH LAXMI ENTERPRISES A PROPRIETOR FIRM,

Versus

VIPULBHAI S.LASKARI

Appearance:

1. Criminal Revision Application No. 588 of 2003

MR FB BRAHMBHATT for Petitioner No. 1

MR VIPULBHAI S.LASKARI- PARTY-IN-PERSON Resp.No.1

MR IM PANDYA, APP for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 05/02/2004

ORAL JUDGEMENT

1. The petitioner is the original complainant of Criminal Case No. 99/2001 pending in the Court of ld.

Metropolitan Magistrate, Ahmedabad in reference to an offence committed under Sec.138 of The Negotiable Instruments Act (The N.I. Act for short). The evidence of the prosecution as well as further statement of the accused under Sec.313 of CrPC has been recorded and in response to the question put to the accused, the respondent accused has mentioned that he wants to enter into defence and examine himself on oath as witness. Before entering into the witness-box, in light of the provisions of Sec.145(2) of the N.I.Act, the accused -respondent no.1 has applied and prayed that his evidence may be accepted by affidavit provided in the scheme of Sec.145. After hearing the parties and mainly original complainant, ld. Metropolitan Magistrate allowed the application and permitted respondent no.1 accused to lead evidence on affidavit with a liberty to cross-examine the accused by the complainant side vide order under challenge dated 23.10.2003.

2. Mr.S.D.Brahmbhatt, ld. counsel appearing for the petitioner has submitted that as per the statements of object and reasons of The Negotiable Instrument (Amendment & Misc. Provisions) Act, 2002 R/w Sec.145 of the Act, only the complainant is conferred with the privilege of leading evidence by filing affidavit and if the accused is permitted to lead his side of evidence by affidavit, then the same will seriously prejudice the complainant and certain questions which normally could not have been permitted to be asked by the Presiding Judge, such leading or suggesting questions can be covered while appreciating the facts stated on oath in his affidavit. The order under challenge has conferred a right to an accused beyond the scope of Section 145(1) and the intention of the legislature. These two arguments are the backbone of the present Revision Application.

3. I have gone through the order passed by ld. Metropolitan Magistrate under challenge. It is a well reasoned order and the same is in accordance with law, especially with the scheme of Sec.145 of the N.I.Act. There is no error of law committed. It would not be legal or logical to accept the argument that if such permission is granted to the accused, it would prejudice the complainant. The statement of object and reasons reflected in para-4 are not exhaustive. This Court is supposed to look into the scheme of Sec.145 of the N.I.Act enacted for the purpose and the statements of objects and reasons are also to be read as a whole.

4. The N.I.Act has been amended by The

Banking,Public Financial Institutions And Negotiable Instruments Laws (Amendment) Act,1988, wherein a new chapter XVII is incorporated for penalty in the case of dishonour of the cheque due to insufficiency of funds in the account of the drawer of the cheque. Para-4 says that keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out amendment for the reasons and/or objects enumerated in the said para. So, it is argued by ld. counsel Mr. Brahmbhatt that the object of Amending Act is to confer privilege on the complainant to tender evidence on affidavit and the ld. Metropolitan Magistrate has wrongly/ erroneously interpreted the scheme of section 145 of the N.I. Act. The accused ought not to have been permitted to lead his evidence as witness on affidavit. Bare reading of the statement of objects and reasons reflected in para-4 are found mainly descriptive or exemplary and not exhaustive. It would be proper to quote relevant para-2 from the objects and reasons of the Amending Act;-

"2. A large number of cases are reported to be pending under sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section."

5. In the above background, the Court is called upon to look into the scheme of Sec.145 of the N.I.Act enacted for the purpose and especially sub-sec.(2) of Sec.145 of the N.I.Act is more relevant for the purpose of this Decision.

"145.Evidence on affidavit.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceedings under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

Section 145 of the N.I.Act begins with non-obstante clause. As per Sec.143 of the Amended Act, notwithstanding anything contained in CrPC, all the offences under the N.I.Act has to be tried by a Judicial Magistrate (First Class) or by a Metropolitan Magistrate, summarily. Sub-section (3) of Sec.143 provides that every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. So, the ld. Magistrate conducting trial on prosecution constituted for commission of an offence under Sec.138 of the N.I.Act, is supposed to look into Chapter:XX of the CrPC and subsequent Chapter dealing with summary trial. Language of sub-sec.(1) of Sec.145 confers the privilege on the complainant to lead evidence on affidavit, but the evidence led on affidavit is subject to all just exceptions be read in evidence in an inquiry, trial or other proceedings under CrPC and such evidence is subject to the purpose and provisions of the Indian Evidence Act. Therefore, accused entering into defence can cross-examine the complainant and obviously the Court can put questions to evaluate the version tendered on affidavit. Sub-sec.(2) of Sec.145 confers privilege and powers i.e. discretionary powers on the Court whereby the Court can summon and examine any person giving evidence on affidavit as to the facts contained in the affidavit filed by that witness. So, the Court can exercise the powers suo motu and also on the application either by the prosecution or by the accused. Therefore, if the complainant intends to examine any witness in support of his version tendered on affidavit, then the Court can accept such evidence on affidavit on the request made by the prosecution and can summon that witness for scrutiny so that the facts averred in the affidavit can be tested under further examination. Phraseology "court may if thinks fit" on one part should be read in the context of other phraseology used in this very sub-sec.(2) which provides that "shall, on the application of the prosecution or accused, summon and examine any person". So, when accused makes an application that a person, who has tendered evidence on affidavit is required to be examined and be called so that the facts contained in the affidavit can be tested on further examination, then it would be obligatory on the part of the Court to summon that witness/person. This privilege is also available to the accused when he so decides and states before the Court that he wants to enter into the defence to disprove the case of the prosecution. Therefore, on the application of the accused requesting the Court to lead his evidence on

affidavit, can be accepted.

6. In the present case, the Court has accepted the request to lead evidence on affidavit advanced by the accused and it is observed by the ld. Magistrate that the request is accepted subject to the right to cross-examine the accused by the complainant side. The words used "examine" in sub-sec.(2) should be read in reference to the right/duty conferred by the Indian Evidence Act and the procedure contemplated under Chapter:X of the said Act. Examination of a person by the Court either suo motu or on the request made by either side means examination of a witness provided under Chapter:X of the Indian Evidence Act. Sections 137 & 138 of the Indian Evidence Act are so connected together that it would be always convenient and proper to consider both these provisions together. Sec.137 defines what is examination-in-chief, cross-examination and re-examination. This is a routine-sequence in examination of a witness as per the ratio of the decision of the Apex Court in the case of Dahyabhai v/s State of Gujarat, AIR 1964 SC 1563. So, the evidence given on affidavit by the accused should be treated as examination-in-chief and complainant side can cross-examine the accused or any other defence witness whose affidavit has been accepted as evidence by the Court under the Scheme of sub-sec.(2) of Sec.145 of the N.I.Act. Such cross-examination is again subject to re-examination, if any. Such a witness also can be examined by the Court simultaneously by putting questions in reference to the contents of the affidavit and facts stated by such witness during cross-examination by the other side. So, the say of the applicant is neither found legal nor sustainable and hence the say is not accepted that the right to lead evidence on oath is the privilege of the complainant only.

7. It is true that there is no need to have permission to examine a particular person as witness but when any person other than the complainant intends to lead evidence or evidence of such a person is required to be produced during the trial of the offence punishable under the N.I.Act, then the application to the Court shall have to be made. Such application does not mean an application in writing. It may be either from prosecution side or on behalf of the accused. In the present case, the accused has applied that his evidence may be accepted on affidavit and this request has been accepted by the Court by a speaking order. Hence, there is no legal or procedural illegality.

8. Section 315 of the CrPC states that any person accused of an offence before a criminal court can be a competent witness for defence and can give evidence on oath to disprove the charge levelled against him or any person charged together with him in the same trial. So, once the accused while giving statement under Sec.313 of CrPC declares that he would enter into the defence, then at a subsequent stage, he can state to the Court that he himself would step into the witness box. So, merely a person is an accused, the mode of examination of a witness would not get changed automatically especially when the Scheme of Sec.145 of the N.I.Act is sufficient to take care of all relevant contingencies. The order under challenge, therefore, requires to be read in that context.

9. In view of above, there is no merits in the Revision Application and, therefore, the same requires to be dismissed. Rule is discharged.

[C.K. BUCH, J]

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